

EXHIBIT 1

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BUNGIE, INC., a Delaware corporation,

Plaintiff,

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN
GREEN, an individual; and JAMES MAY, an
individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS' [PROPOSED]
PRETRIAL ORDER**

Defendants Aimjunkies.com, Phoenix Digital Group LLC, Jeffrey Conway, David Schaefer, Jordan Green and James May present this [Proposed] Pretrial Order.

Defendants accept Plaintiff's statement of jurisdiction.

Defendant's Statement of Counterclaim and Defenses

All Defendants assert the following defenses:

1. No software created, developed, marketed, advertised, sold or otherwise distributed by Defendants infringes any copyright of Bungie, Inc.

2. No software created, developed, marketed, advertised, sold or otherwise distributed by Defendants infringes any trademark of Bungie, Inc.

3. Defendant James May is not, and never has been, a member, owner, officer, director, employee or otherwise had a controlling interest in Phoenix Digital Group LLC and is not responsible or liable for any activities carried on by Phoenix Digital Group LLC.

4. The software at issue here was created by parties other than Defendants.

5. Defendants did not have access to the software Bungie accuses them of copying.

6. Bungie cannot show “substantial similarity” between any software distributed by Phoenix Digital and the copyrighted works asserted by Bungie in this action.

7. Phoenix Digital Group LLC’s distribution of the software at issue in this case did not cause harm or damage to Bungie, Inc.

All Defendants assert the following affirmative defenses:

1. Plaintiff’s Amended Complaint fails to state claims for which relief may be granted.

2. Plaintiff’s claims for copyright infringement are barred under the clear holding of the Ninth Circuit Court of Appeals in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928 (9th Cir. 2010), that, *as a matter of law*, alleged breaches of covenants in a copyright license are *not* acts of copyright infringement.

3. Plaintiff’s claims for copyright infringement are barred under the clear holding of the Ninth Circuit Court of Appeals in *Lewis Galoob Toys, Inc. v. Nintendo of America*, 964 F.2d 965 (9th Cir. 1992) that, *as a matter of law*, the use of software resident on the computer of a game player to enhance the player’s performance of the game does *not* unlawfully create a “derivative work” or otherwise infringe a copyright.

4. All claims for “statutory damages,” “enhanced damages,” “attorneys’ fees” or other relief under 17 U.S.C. §§ 505, 505 are barred under 17 U.S.C. §§ 412 and the clear holding of the Ninth Circuit Court of Appeals in *Derek Andrew, Inc. v. Poof Apparel Corp.*,

1 528 F.3d 696 (9th Cir. 2008) that, “to recover statutory damages, the copyrighted work must
2 have been registered prior to commencement of the infringement,” and that, “the first act of
3 infringement in a series of ongoing infringements of the same kind marks the commencement
4 of one continuing infringement under § 412.”

5 5. All use by Defendants of the “DESTINY Marks” as alleged was a nominative
6 or descriptive “fair use” of the marks given that such use was only to refer, accurately, to the
7 actual products of Plaintiff Bungie, Inc., and/or to describe, accurately and truthfully, what the
8 products at issue here do.

9 6. Plaintiff’s claims are barred by the doctrine of unclean hands in that they are
10 based on information illegally and unlawfully obtained by Bungie, Inc., through the
11 unauthorized, clandestine accessing and downloading of information contained in private files
12 on the personal computer of Defendant James May.

13 7. Plaintiff’s claims are barred by the doctrine of unclean hands in that they are
14 based on information illegally and unlawfully obtained by Bungie, Inc., through breach of the
15 Terms of Service of Defendant Phoenix Digital Group LLC.

16 8. Plaintiff is precluded from recovering any damages that could have been
17 avoided through the exercise of reasonable care and due diligence.

18 **UNDISPUTED FACTS**

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20 Proposed undisputed facts 3, 5, 6 and 7 are undisputed. All others are not admitted by
21 Defendants and are subject to proof by Plaintiff.

22 **ISSUES OF LAW**

23
24 Plaintiff has requested various forms of injunctive relief. Whether the requested
25 injunction(s) should issue is a question of law.

1 Plaintiff has also requested various forms of enhanced damages beyond actual
2 damages to be proven at trial. Whether such enhanced damages should be awarded is a
3 question of law.

4 All parties are seeking attorneys fees and costs in this action. Whether such fees
5 and/or costs should be awarded is a question of law.

7 DEFENDANTS' WITNESSES

8 **Expert Witness:**

- 9 1. Brad A. LaPorte (*will testify*)
10 331 Zenith Lane
11 Juno Beach, FL 33408
(706) 726-1502

12 Mr. LaPorte will testify as to the opinions stated in his Expert Report served August
13 28, 2023 as well as the grounds and other bases for those opinions.

15 **Fact Witnesses:**

- 16 1. David Schaefer (*will testify*)
17 c/o Philip P. Mann
18 Mann Law Group PLLC
403 Madison Ave. N. Ste. 240
19 Bainbridge Island, WA 98110
(206) 436-0900

20 Mr. Schaefer is a named defendant and President of Defendant Phoenix Digital Group
21 LLC. He will testify as to the operation of Phoenix Digital Group including its business
22 model. He will deny the various unfounded accusations made by Bungie in this case,
23 including but not limited to Bungie's unfounded accusations that Phoenix Digital "copied"
24 any copyrighted materials of Bungie and/or infringed Bungie's trademarks. He will further
25 testify as to how Bungie violated the Aimjunkies/Phoenix Digital terms of service and caused
26

1 harm to Phoenix Digital. Mr. Schaefer will also testify as to all accusations that may be made
2 against him and/or Phoenix Digital at trial by Bungie.

3 2. James May (*will testify*)
4 c/o Philip P. Mann
5 Mann Law Group PLLC
6 403 Madison Ave. N. Ste. 240
7 Bainbridge Island, WA 98110
8 (206) 436-0900

9 Mr. May is a named defendant. Mr. May will testify that he is not and has never been
10 a part of Phoenix Digital and had nothing to do with the alleged, “cheat” software that is the
11 subject matter of this lawsuit, including, but not limited to, the creation, development and/or
12 distribution of the software. Mr. May will testify that he has never received any of the
13 proceeds from distribution or sale of the subject software. Mr. May will deny the various
14 unfounded accusations made by Bungie in this case, including but not limited to Bungie’s
15 unfounded accusations that he helped develop or otherwise “created” the subject software.
16 Phoenix Digital “copied” any copyrighted materials of Bungie and/or infringed Bungie’s
17 trademarks. He will further testify as to how Bungie, without his authorization, unlawfully
18 accessed his private computer files and caused harm to him. Mr. May will also testify as to
19 all accusations that may be made against him at trial by Bungie.

20 3. Jordan Green (*possible witness only*)
21 c/o Philip P. Mann
22 Mann Law Group PLLC
23 403 Madison Ave. N. Ste. 240
24 Bainbridge Island, WA 98110
25 (206) 436-0900

26 Mr. Green is a named defendant and a member of Defendant Phoenix Digital Group
27 LLC. He may testify as to the operation of Phoenix Digital Group including its business
28 model. He will deny the various unfounded accusations made by Bungie in this case,
including but not limited to Bungie’s unfounded accusations that Phoenix Digital “copied”
any copyrighted materials of Bungie and/or infringed Bungie’s trademarks. He may further

1 testify as to how Bungie violated the Aimjunkies/Phoenix Digital terms of service and caused
 2 harm to Phoenix Digital. Mr. Green may also testify as to all accusations that may be made
 3 against him and/or Phoenix Digital at trial by Bungie.

- 4 4. Jeffrey Conway (*possible witness only*)
 5 c/o Philip P. Mann
 6 Mann Law Group PLLC
 7 403 Madison Ave. N. Ste. 240
 8 Bainbridge Island, WA 98110
 9 (206) 436-0900

10 Mr. Conway is a named defendant and former member of Defendant Phoenix Digital
 11 Group LLC. He may testify as to the operation of Phoenix Digital Group including its
 12 business model. He will deny the various unfounded accusations made by Bungie in this
 13 case, including but not limited to Bungie's unfounded accusations that Phoenix Digital
 14 "copied" any copyrighted materials of Bungie and/or infringed Bungie's trademarks. He may
 15 further testify as to how Bungie violated the Aimjunkies/Phoenix Digital terms of service and
 16 caused harm to Phoenix Digital. Mr. Conway may also testify as to all accusations that may
 17 be made against him and/or Phoenix Digital at trial by Bungie.

- 18 5. Donald McGowan (*will testify*) (Adverse Witness)
 19 c/o William Rava
 20 PERKINS COIE
 21 1201 Third Avenue,
 22 Seattle, WA. 98101
 23 Telephone: (312) 206-5162

24 Mr. McGowan will testify as to public statements he has made on behalf of Bungie
 25 concerning Bungie's desire and efforts to combat "cheating" in Destiny 2.

- 26 6. [REDACTED] (aka, "John Doe") (*will testify*) (Adverse Witness)
 27 550 106th Avenue NE, Suite 207
 28 Bellevue, WA 98004-5088

Mr. Doe will testify as to his acquisition of software from the “Aimjunkies” website, including but not limited to his use of an assumed name in doing so and his agreement to the Aimjunkies/Phoenix Digital Terms of Service in so doing. Mr. Doe will also testify as to the circumstances under which he was instructed or otherwise induced to perform these acts on behalf of Bungie.

7. Dr. Edward Kaiser (*will testify*) (Adverse Witness)
550 106th Avenue NE, Suite 207
Bellevue, WA 98004-5088

Dr. Kaiser will testify that he never saw, used, analyzed or otherwise inspected the software at issue in this action.

8. Mr. Steve Guris (*possible witness only*) (Adverse Witness)
550 106th Avenue NE, Suite 207
Bellevue, WA 98004-5088

Mr. Guris may testify that he never saw, used, analyzed or otherwise inspected the software at issue in this action.

Defendants may also call any witness identified on Plaintiff’s Witness list.

Defendants reserve the right to call additional witnesses who may not be identified here.

DEFENDANTS’ EXHIBITS

Exhibit #	Description	AS ¹	AS/AD ²	AD ³	A ⁴
200	Expert Report – Brad LaPorte				
201	Brad LaPorte Resume				
202	Brad LaPorte Publications				
203	Amended Answer and Counterclaim (DKT#72)				

- 1 Admissibility Stipulated.
2 Authenticity Stipulated/Admissibility Disputed.
3 Authenticity Disputed.
4 Admitted.

1	204	BUNGIE_WDWA_0000409.XLSX				
2	205	Bungie Privacy Policy (DKT#66-1)				
3	206	Bungie LSLA (Dkt#34-1)				
4	207	BUNGIE_WDWA_0000367				
5	208	Phoenix Digital Terms of Service (DKT#75-2)				
6	209	BUNGIE_WDWA_0000468				
7	210	BUNGIE_WDWA_0000413				
8	211	BUNGIE_WDWA_0000415				
9	212	BUNGIE_WDWA_0000464				
10	213	BUNGIE_WDWA_0000465				
11	214	BUNGIE_WDWA_0000466				
12	215	BUNGIE_WDWA_0000467				
13	216	BUNGIE_WDWA_0000479				
14	217	BUNGIE_WDWA_0000481				
15	218	BUNGIE_WDWA_0000482				
16	219	BUNGIE_WDWA_0000516-7				
17	220	BUNGIE_WDWA_0000539				
18	221	BUNGIE_WDWA_0000540				
19	222	BUNGIE_WDWA_0000541				
20	223	BUNGIE_WDWA_0000368 (AEO)				
21	224	BUNGIE_WDWA_0000410 (AEO)				
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1	225	BUNGIE_WDWA_0000412 (AEO)				
2	226	BUNGIE_WDWA_0000416 (AEO)				
3	227	BUNGIE_WDWA_0000417 (AEO)				
4	228	BUNGIE_WDWA_0000419 (AEO)				
5	229	BUNGIE_WDWA_0000420 (AEO)				
6	230	BUNGIE_WDWA_0000421 (AEO)				
7	231	BUNGIE_WDWA_0000463 (AEO)				
8	232	BUNGIE_WDWA_0000606-7				
9	234	Mann Declaration Exhibit A (DKT#191-1)				
10	235	Mann Declaration Exhibit B (DKT#191-2)				
11	236	Mann Declaration Exhibit C (DKT#191-3)				
12	237	Mann Declaration Exhibit D (DKT#191-4)				
13	238	Kaiser Declaration (DKT#36)				
14	239	Kaiser Declaration (DKT#66)				
15	240	Kaiser Declaration (DKT#158)				
16	241	Kaiser Declaration Exhibit 2 (AEO) (DKT#159)				
17	242	Kaiser Declaration (DKT#183)				
18	243	BUNGIE_JAMS_0000060				
19	244	BUNGIE_JAMS_0001026				
20	245	BUNGIE_JAMS_0001059				
21	246	BUNGIE_JAMS_0001061-2				

1	247	BUNGIE_JAMS_0001153				
2	248	BUNGIE_JAMS_0001383				
3	249	BUNGIE_JAMS_0000720				
4	250	BUNGIE_JAMS_0000060				
5	251	BUNGIE_JAMS_0000060				
6	252	BUNGIE_JAMS_0000060				
7	253	Arbitration Exhibit PDG0004				
8	254	Arbitration Exhibit PDG0006				
9	255	Arbitration Exhibit PDG0014a				
10	256	Arbitration Exhibit PDG0014b				
11	257	Arbitration Exhibit PDG0015				
12	258	Arbitration Exhibit PDG0018				
13	259	Arbitration Exhibit PDG0066				
14	260	Arbitration Exhibit PDG0087				
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6 Defendants reserve the right to supplement their list of exhibits if Plaintiff is allowed
7 to identify and introduce any exhibits at trial in this matter. To avoid unnecessary duplication,
8 Defendants reserve the right to use any exhibit listed on Plaintiff's exhibit list. To the extent
9 Plaintiff removes exhibits from its previously served exhibit list, Defendants reserve the right
10 to subsequently add such removed exhibits to their exhibit list. Defendants reserve the right
11 to present exhibits, the need to which cannot be reasonably foreseen prior to trial and the
12 presentation of Plaintiff's case. Defendants reserve the right to use demonstrative and
13 illustrative exhibits whether or not designated as a trial exhibit in this Pretrial Statement or in
14 the Pretrial Order. Defendants reserve the right to use any exhibit for impeachment purposes,
15 whether or not designated as a trial exhibit in this Pretrial Statement or in the Pretrial Order.
16 Defendants reserve the right to designate additional exhibits for rebuttal purposes or otherwise
17 for admission at trial. Defendants reserve the right to use any exhibits listed in Plaintiff's
18 preliminary list of trial exhibits.

19 Dated October 20, 2023.

20 Respectfully submitted,

21 /s/ Philip P. Mann

22 Philip P. Mann, WSBA No: 28860

23 **Mann Law Group PLLC**

24 107 Spring St.

25 Seattle, Washington 98104

26 Phone (206) 436-0900

27 Fax (866) 341-5140

28 phil@mannlawgroup.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2023, I caused the foregoing document to be electronically mailed to counsel of record as follows:

WRava@perkinscoie.com

JDini@perkinscoie.com

CMarcelo@perkinscoie.com

s/ Philip P. Mann

EXHIBIT 2
FILED UNDER SEAL

EXHIBIT 3
FILED UNDER SEAL

EXHIBIT 4
FILED UNDER SEAL

EXHIBIT 5
FILED UNDER SEAL

EXHIBIT 6
FILED UNDER SEAL